



TOWN OF BROOKLINE

Massachusetts

BOARD OF APPEALS

DIANE R. GORDON, Co-Chair
HARRY MILLER, Co-Chair
BAILEY S. SILBERT

333 Washington Street
Brookline, MA 02445
617-730-2010
Fax: 617-730-2298

TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 60080

PATRICK J. WARD, Secretary

On November 17, 2006, Petitioners, Richard and Ellen Grossman (the "Grossmans") filed an appeal with the Board of Appeals pursuant to G.L. c.40A, §8 from the written decision of James J. Nickerson, the Building Commissioner (the "Commissioner"), dated October 26, 2006 relative to the Project known as the Longyear Development and more particularly, Building D at 120 Seaver Street (hereinafter referred to as the "Project"). The owner of the Project for the purposes of this appeal is Longyear Properties, LLC (hereinafter referred to as the "Developer"). In their aforementioned "request for enforcement" directed to the Commissioner, the Grossmans contended that the construction of Building D would cause the Project to exceed the allowable Floor Area Ratio restriction contained in the Special Permit and modifications thereto and the Town's Zoning By-Law. The Grossmans also requested the Commissioner to revoke the Building Permit for Building D. By way of letter dated October 20, 2006, the Commissioner notified the Grossmans of his determination that the Project complied with the Special Permit, and modifications thereto and the provisions of the applicable Zoning By-Law. Therefore, the Commissioner denied the Grossman's October 17, 2006 request to revoke the building permit and stop the work. This appeal followed.

The Board of Appeals determined that the properties affected were those shown on a schedule in accordance with the certification prepared by the Assessors of the Town of Brookline and approved by the Board of Appeals, and fixed January 18, 2007, at 7:30 p.m. in the Selectmen's Hearing Room on the sixth floor of the Town Hall as the time and place of the hearing on the appeal. Notice of the hearing was mailed to the Petitioner, the attorneys of record, if any, to the owners of the properties deemed by the Board to be affected as they appeared on the most recent local tax list, to the Planning Board and to all

others required by law. Notice of the hearing was published December 28, 2006 and January 4, 2007 in the *Brookline Tab*, a newspaper published in Brookline and mailed to all those required by law. A copy of the initial notice is as follows:

TOWN OF BROOKLINE
MASSACHUSETTS
BOARD OF APPEALS
NOTICE OF HEARING

Pursuant to M.G.L., C.39, sections 23A and 23B, the Board of Appeals will conduct a public hearing to discuss the following case:

Petitioners: **Richard and Ellen Grossman**
Location of Premises: **Building D, 120 Seaver Street, Brookline**
Date of Hearing: **Thursday, January 18, 2007**
Time of Hearing: **7:30 p.m.**
Place of Hearing: **Selectmen's Hearing Room, 6th Floor**

A public hearing will be held for an administrative appeal of a decision by the Building Commissioner, Town of Brookline, not to rescind a building permit for Building D at 120 Seaver Street, Brookline, Massachusetts.

Said Premise located in an S-0.5P district.

The Town of Brookline does not discriminate on the basis of disability in admission to, access to, or operations of its programs, services or activities. Individuals who need auxiliary aids for effective communications in programs and services of the Town of Brookline are invited to make their needs known to the ADA Coordinator, Stephen Bressler, Town of Brookline, 11 Pierce Street, Brookline, MA 02445. Telephone: (617) 730-2330; TDD (617) 730-2327.

Diane R. Gordon
Harry Miller
Bailey S. Silbert

At the time and place specified in the notice, a public hearing was held by this Board. Present at the hearing was Chairman, Diane Gordon and Board members Enid Starr and Bailey Silbert. The hearing on January 18, 2007 was not completed, and therefore, the Board scheduled a second night and continued the matter to February 1, 2007. On the first night of the hearing, counsel for the Grossmans, Lawrence DiCara filed a written waiver of the statutory time requirements for both the hearing and the Board's decision. On February

6, 2007 the Board conducted a site visit. Present at the site visit were the Board Members, the Developer's counsel, Eric Goldberg, Richard Grossman with his attorney Collette Dafoe, Town Counsel, Jennifer Dopazo, Polly Selkoe, Assistant Planning Director and Mrs. Helman, an abutter to the Project. On the second night of hearing, the Board closed the hearing and scheduled March 1, 2007 for deliberation.

Sitting for the hearing on January 18, 2007 was the Chairman, Diane Gordon and members Enid Starr and Bailey Silbert. Ms. Starr began by making a public disclosure pursuant to G.L.c.268A with regard to her son being an attorney at the same law firm, Seegel, Lipshutz and Wilchins, P.C. as counsel for the Developer. Ms. Starr indicated that she has made the required formal written disclosure to the Board of Selectmen and they had made the appropriate findings with respect to her ability to serve as a Board member on this case and other cases. A copy of that disclosure form is a public record on file with the Board of Selectmen's Office. In addition, Ms. Starr made an additional disclosure with respect to one of the architects, Hans Strauch who issued an opinion for the Developer in this matter. Ms. Starr stated that she and Mr. Strauch are two of approximately 25 voluntary Trustees of Lesley University. Neither have a financial interest in each other's business nor do they have a social relationship. Ms. Starr called the Ethics Commission and they suggested she make the disclosure and file a letter with the Board of Selectmen, which she has done. Finally, Ms. Starr disclosed that in looking out at the audience she sees friends who she believes are opposed to the Project and present to support the Grossmans; however, she stated that this will not affect her ability to serve impartially.

There being no objection to Ms. Starr serving on the Board, the Chairman opened the hearing. The Chairman stated that the Developer had requested a stenographer be present and this request was granted. The Board heard preliminary motions first. Counsel for the Developer, Jeffrey Allen of Seegel, Lipshutz and Wilchins, P.C. filed two preliminary Motions for the Board's consideration. The first was a Motion to Dismiss the Grossman's Appeal for Lack of Standing. The second, was to limit the Grossman's appeal to the issues stated in their application filed with the Board which alleged that the Project exceeds the allowable Floor Area Ratio ("FAR") by 8,590 square feet, and to disregard their most recent allegation as stated in the Grossman's Opposition to the Developer's Motion to Dismiss that the Project exceeds the allowable FAR by 13,729 square feet.

With respect to the Developer's Motion to Dismiss for Lack of Standing, Mr. Allen opined that the Grossmans were not aggrieved parties. Although there is a presumption of standing, because the Grossmans are abutters to the Project, this presumption disappears once challenged. The Grossmans must prove, by direct evidence an injury unique to them and related to the claimed zoning violation. There must be an injury to the Grossmans as a result of the density of the Project. Mr. Allen stated that there is no evidence of a specific injury to the Grossmans and in the case of Standerwick, the Court makes it very clear that you need more than mere allegations of increased traffic, noise or loss of privacy. There must be evidence of a specific injury. Mr. Allen stated that the evidence, is to the contrary, that there is no injury to the Grossmans. He requested the Board apply the law and dismiss the Grossman's appeal for lack of standing. He then rested on his Memorandum of Law in Support of the Motion to Dismiss dated January 11, 2007. A supplement dated January 31, 2007 to that memorandum was also filed with the Board prior to the second night of hearing.

The next speaker was Attorney Lawrence S. DiCara of Nixon Peabody on behalf of the Grossmans. Mr. DiCara stated that the Grossmans and their neighbors were present and had photographs showing the change in view from their property due to the increase to Building D. The Grossmans seek an opportunity to present their evidence to the Board as is their right as abutters under the law. He stated that abutters are entitled to a presumption of standing. Standing is grounded in a number of legal injuries. He went on to note, for example, that in the Marashlian case the Court found standing based upon the collective effect of a number of injuries including reduced market value of property, loss of on-street parking, loss of light and air, increased noise and loss of privacy, views and density. The question for the Board, he said is one of FAR; when is 0.5 not 0.5? He believes the aggregate theme of density control is a strong basis for standing. He indicated that the Grossmans will present two different analyses of the increase in FAR which has resulted over a period of years and will argue that this Board should appoint an independent party to review the FAR issues and settle them once and for all.

Chairman Gordon sought clarification on Mr. Allen's motion with respect to the Grossman's two analyses of 8,500 +/- and the recent 13,500 +/- . Mr. Allen stated that the analyses originally stated in the Grossman's appeal was the lower number and that number should control.

Ms. Starr stated that with respect to the standing issue the law is clear. If the entire Project exceeds the FAR then from that point of view the Grossmans would have standing, but not just for Building D.

Chairman Gordon requested assistance and advice from Town Counsel on these preliminary matters.

Town Counsel, Jennifer Dopazo addressed the Board. She stated that she had reviewed the briefs and the case law cited by both parties. In her opinion, the law on the issue of standing was correctly outlined for the Board by both parties. Town Counsel stated that the Board had two options at this point; decide the dispositive motion relative to standing now; or take the matter under advisement and proceed to the hearing on the merits. Town Counsel stated that the Grossmans indicated they wished to submit evidence both on the standing issue as well as the FAR. Town Counsel recommended proceeding with the hearing and allowing the Grossmans to make their case both on the standing issue and the FAR. Town Counsel recommended that the Board take both preliminary motions under advisement, hear all the evidence and decide the motions after the hearing is closed.

The Board agreed with Town Counsel's recommendation and took the motions under advisement and proceeded to hear the case on the merits.

Attorney Allen moved to strike a document submitted to the Board by the Grossmans. This document was a report relative to the FAR of the Project prepared by LeMesurrier Consultants, dated January 18, 2007. The Chairman asked Mr. Allen the grounds for such request. Mr. Allen stated that the report states "we have calculated the gross square floor area based on the latest zoning by-laws of the Town of Brookline. Mr. Allen stated that there were massive changes to the by-laws pertaining to FAR since the Special Permit for the Project was issued in 1996 and G.L.c.40A, Section 6 specifically states the Project proceeds under the Zoning By-Laws in effect in 1996.

Attorney DiCara stated that the Grossmans appealed the Building Commissioner's determination because the Town has incorrectly interpreted the Zoning By-Laws resulting in a greater square footage and density of the Project than allowed by the special permit issued ten years ago. The Grossmans submitted photographs to the Board showing the view of Building D from their home at 33 Leicester Street. Attorney DiCara stated that the impact

of the Project is direct and unique to the Grossmans. Mr. DiCara stated that the FAR study conducted by LeMessurier Consultants will show the increased FAR and density.

Attorney Allen requested that the Board rule on his motion to strike the LeMessurier report, because they improperly used the current version of the Zoning By-Laws rather than the 1996 by-law in effect when the special permit for the Project was issued.

Chairman Gordon asked Attorney DiCara what by-law was used by LeMessurier to prepare their report. Attorney DiCara stated that the report was premised on the special permit in 1996 which permitted 174,583 in square footage for the Project. The Chairman again asked if the 1996 version of the Zoning By-Law was used in LeMessurier's analysis. Attorney Allen noted for the Board that the LeMessurier report states in the last paragraph on the first page of the report "I'm using the zoning by-laws of the Town as they now exist." In addition, Attorney Allen noted that the report talks about "ceiling height above 12 feet to be included" and this was a change to the by-law that just happened within the last year.

Chairman Gordon stated the Board can not accept an analysis based on the wrong version of the zoning by-law. However, if the charts use a different measure then the charts maybe considered, but not the report. Attorney DiCara requested that the Board allow Mr. Gil Fishman to address this matter since he prepared the charts.

Mr. Fishman of 79 Holland Road addressed the Board. He stated that he is an abutter to the Project, a Town Meeting Member and a Member of the Town's Zoning Committee. Mr. Fishman stated that with respect to the charts, Buildings A, B and C are based on the 1996 zoning by-laws. Buildings D and E are based on the current version of the by-laws. The calculations for Buildings D and E are based on the new code that was passed by Town Meeting last May.

The Board expressed its concern about accepting evidence based on the wrong version of the zoning by-laws. Chairman Gordon commented that the hearing would need to be continued and she would not object to allowing Attorney DiCara to resubmit the report and charts based only on the 1996 by-laws. The Chairman then recognized Town Counsel.

Town Counsel, Jennifer Dopazo made two points. First, she stated that the 1996 version of the by-laws applies to this Project and G.L.c.40A, s.6 supports that conclusion. Second, she strongly advised the Board that if it decided to continue the hearing that the Board get a written waiver of the statutory time requirements from the Grossmans. A brief

discussion among the Board members relative to the by-law ensued. Town Counsel then read the language of the statute in order to shed some light on the matter.

Chairman Gordon stated that subject to Attorney DiCara providing the Board with a written waiver of the statutory time limits the Board would allow the Grossmans to resubmit the LeMessurier report and the charts based on the 1996 by-laws at the second night of hearing.

Mr. DiCara agreed to provide the written waiver. He opined that the research that had been done suggests that Building B which was intended to be 42,332 square feet, in fact, is 48,996. Building C was constructed 40 feet closer to the road than agreed upon and was built one story higher than agreed upon. He noted that an amendment to the Special Permit was issued in June of 2004 suggesting that Building C would now be 67,429, all within the agreed upon total amount of 174,583. Building E, a preexisting building, was deemed in 1996 to be 29,101 square feet. Attorney DiCara went on to state that the issue apparently is whether the owners of the property can decommission space in order to reduce that square footage. Building A is 16,710. He concluded that arithmetic suggests Building D can only be approximately 6,000 square feet. Therefore, he continued, the building permit that authorizes Building D to be 19,408 square feet is the one the Grossmans seek to overturn. Attorney DiCara went over the Grossman's concerns regarding density and stated that they should have an opportunity to speak before the Board and explain exactly what their concerns are. Attorney DiCara requested that the Board appoint a neutral party to review the FAR issue.

Board Member Enid Starr asked where was the person standing who took the photographs of the Grossman's house. Attorney DiCara stated that the photo was taken from the sidewalk in front of the Grossmans' house at 33 Leicester Street.

Ms. Starr stated that she is familiar with the area and she did not find the photograph to be accurate. Specifically, she has gone to the Grossman's house and about half of the view of Building D is completely hidden by another house that's there. There is a house between the Grossmans' property and Building D so she believes you can only see Building D from a corner of the Grossman's property. She noted her concerns about whether the photos were a fair and accurate representation.

The Chairman asked Mr. DiCara to speak to the issue of standing. Mr. DiCara referred to the photographs and the size of Building D. He opined that the Grossmans were aggrieved parties and referred to the Grossman's Memorandum in Opposition to the Motion to Dismiss filed with the Board, which outlined the case law supporting the Grossman's position on the standing issue.

Member Enid Starr asked if it was the Grossman's contention that Building D blocked their light. Mr. DiCara answered that this was their position. Ms. Starr noted that Building D is to the North of the Grossman's property. Ms. Starr asked how many feet Building D is from the Grossman's property. Mr. DiCara stated 225 to 245 feet.

Chairman Gordon called on anyone wishing to speak in favor of the Grossman's appeal. The Board heard from one of the petitioners, Ellen Grossman. Ms. Grossman referred to the photographs submitted to the Board and indicated this was her view from her breakfast nook. A brief discussion between the Board and Ms. Grossman and Mr. Fishman regarding the photographs ensued. Chairman Gordon accepted the photographs and marked the view from the breakfast room as Exhibit 1 and the other photograph as Exhibit 2.

The next speaker in support of the Grossman's appeal was Paula Friedman of 170 Hyslop Road. Ms. Friedman informed the Board that she was a member of the Fisher Hill Neighborhood Association. Ms. Friedman stated that for nine years the neighbors have been asking that the Developer abide by the terms of the special permit. She opined that the evidence showed overbuilding in excess of the allowable FAR by 10,000 to 15,000 square feet. Ms. Friedman requested that the Board stop the construction and conduct an independent analysis. She stated that an independent study would send a clear message that the Board wants us all to know that it cares about proper and transparent enforcement of the Town's bylaws. To do this would be the right thing not only for Fisher Hill but the whole Town.

Gill Fishman spoke in favor of the Grossman's petition. He indicated he was the co-president of the Fisher Hill Association along with Paula Friedman. He lives at 79 Holland Road, which abuts the property. He is an architect. Mr. Fishman referred to a version A analysis which, he stated was based on the 1996 codes. Mr. Fishman stated

that this version takes the architect's square footage and simply adds back in the spaces inappropriately left out like egress areas for each floor. Mr. Fishman stated that the by-law clearly says, "Egress in the footprint of stairwells and elevators in every floor" and "Horizontal square area of the stairwells and elevators must be counted at each level." He believes that the Project architect left out the new additions in Building E, the mansion. He stated there's about 1,680 square feet of additions and egress areas in the mansion. Mr. Fishman went on to state that, in Building A, the Developer's architect states it's 12,189 square feet. He believes the egress to the basements and finished basement space must be included, because according to the assessor's office, at least two of the basements are finished and can be assessed as such and possibly a third basement. Mr. Fishman stated he has seen two of them from the outside. Adding these areas brings Building A up from 12,189 to 16,821 square feet. Likewise, he continued, when you add to Building D, which is noted as 47,032 square feet, the egress at the basement level, it comes to 49,253, and Building C, instead of being 67,429 becomes 69,397. He opined that the total of A, B, and C instead of being 126,650 square feet is 135,471 square feet. He noted that the Developer claims Building E is 29,100 square feet. However, he stated that when you go back to the special permit and you take the 174,583 square feet of the overall Project and you subtract what they stated in the other four buildings, you get 29,101. Mr. Fishman believes that when you add the new additions and the egress, you get 30,781 square feet for Building E. In his opinion, the total of buildings A-D, instead of being 154,750 square is 166,252 square feet. He noted that the Developer claims they're building 19,408 square feet for Building D, however, adding up Buildings A plus B plus C plus what they're planning on E based on their own drawings, it only leaves 8,331 square feet left to build, and that's where the 8,000 number came from in the appeal.

In conclusion, Mr. Fishman stated that using the Developer's numbers and adding in only what he believes was mistakenly left out along with the additions, and assuming that the mansion hasn't shrunk, the most they can build is 8,331 square feet, which means they're 11,500 over.

Member Bailey Silbert stated that in some of the submittals that were given to us by various architects, there is a consistent comment which refers to horizontal egress

corridors including vestibules, lobbies, located on levels, quote, "Designated for the parking of motor vehicles in order to meet the requirements of the bylaw may be omitted from the gross floor area." So, he continued the Board needs help with regard to Mr. Fishman's comments about omissions having been made for egress in light of this statement by the Project architects that certain areas should be omitted. Mr. Silbert asked Mr. Fishman how that played into what he presented.

Mr. Fishman stated that he believes that statement is inaccurate. The bylaws make it clear. It says these areas must be counted.

Mr. Silbert questioned whether these spaces should be counted regardless of whether it is for habitation or parking.

Mr. Fishman believes these spaces must be counted on each level regardless. Mr. Fishman had a memory that believes former Town Counsel, Dave Turner had the DPW do an analysis of Building C in 2005. His recollection is that Mr. Turner at that time also thought the egress had to be counted on the first level.

Chairman Gordon and Mr. Silbert noted that all the Project Architects agreed these spaces are not counted toward the FAR.

Mr. Fishman noted that Mr. Turner wasn't paid by the Developers.

Mr. Silbert and Chairman Gordon commented on the import of the architects' certifications and stamps.

Michael Shepard the Town's Zoning Administrator then read from portions of the definition section of the by-law pertaining to Gross Floor Area as well as Section 5.06 Paragraph 4, Subparagraph b (3) and referred to section 2.11 of the 1996 by-law pertaining to Gross Floor Areas. Mr. Shepard's interpretation of the by-law is that these areas are not included in the gross square footage.

Mr. DiCara stated that the point of that article is that the garage is unfinished space. The vestibules and stairwells on those levels are finished space, "finished" meaning presumably living space, and therefore should be included. In fact, he noted that where it says, "Egress"; above in the main section of the bylaw it says, "The egress that should be counted."

The next speaker in support of the Grossman's petition was Shaari Mittel, 9 Buckminster Road, Town Meeting Member, Precinct No. 14, member of the Town

Advisory Committee, and board member of the Fisher Hill Association. She was very concerned about the issue of overdevelopment at Longyear. She believes that there is a significant discrepancy between the gross square footage figures, and she requested that the Board authorize an independent professional analysis of the square footage. She noted that in 2005, former Brookline Planning Director, Bob Duffy, had his staff do an analysis of the property, and their figures showed there was overbuilding. She concluded by urging the Board to overturn the building commissioner's decision and rescind the building permit for Building D.

The next speaker was Roger Tackeff of 86 Dean Road in Brookline. He stated that his parents also live in Brookline, as did his grandparents. Mr. Tackeff stated that he has no financial or personal interest in the proceedings, however, he cares deeply about the outcome of the proceedings. Mr. Tackeff was asked to Chair the citizen review committee for the Longyear development more than a decade ago. He stated that the committee's goal was to come up with a plan for the restoration and the redevelopment of one of the most important and historic sites in all of Brookline. He recalled that the community got assurances from the Developer and the Town that the historic character of the site and Manor house would be preserved and that no building would be taller than the grand Manor house.

He stated that the Developer received a dramatically increased density to ensure not only the economic viability of the property, but the substantial profitability. The Town participated in and supported a process and the outcome so that Brookline would be assured of substantial new tax revenues to benefit the entire community. He stated that the Developer's promises as a party to this agreement were short-lived and instead of the Project taking a few years, it has now been over a decade. He stated that the Developer has had internal fights, a fracturing of their partnership, a series of contractual relationships that went sour, a succession of architects and lending institutions no longer affiliated with the Project. He believes most alarming are the numerous legal entanglements from the very buyers they have sold to. In order to save the Project, he believes the Developers have resorted to pushing the envelope of virtually every agreed-upon zoning criteria that the zoning was based upon. In his opinion, the buildings are taller; bulkier; and closer to their neighbors' homes and exceed the approved square

footage. He reminded the Board that the Developer was allowed to double the 0.25 FAR of the surrounding neighborhood.

He believes that the Developer, in order to build more than what is allowed, invented new ways, unique in their development, to measure the buildings. Mr. Tackeff did not want to repeat what was already said, but questioned how the Manor house which contained approximately 29,000 square feet for over a century could have additional square footage added yet end up with substantially less for the purposes of determining FAR. He pointed out that the decommissioning of space is no longer permitted in the Town of Brookline and by having space simply disappear in the Manor house, the Developers were able to add thousands of square feet of new construction, producing millions of dollars of additional revenue. In conclusion, Mr. Tackeff requested an independent analysis for the actual square footage.

Mr. John Bassett of 26 Searle Avenue, Town meeting member for Precinct 6, and an officer of the Neighborhood Alliance was the next speaker. In his opinion, the process of permitting the construction of this development has been an embarrassment for years, and it has not been handled well by the Town. He supports an independent analysis of the square footage.

Attorney Allen was the next speaker on behalf of the Developer. Mr. Allen submitted an as-built floor plan for Longyear prepared by M.Z.O. Architectural Group, Inc., dated June 25, 1999 related to the three units with portions of the master deed attached. The Chairman marked this document as Exhibit 3.

Mr. Allen stated that he has watched the Board now for over 30 years. He noted that his first impression of the Board is the same impression that he has today; and that's always being impressed with the integrity and the dignity of how the Board deals with its quasi-judicial function. He opined that the action of the Board should not be a political process, but rather a legal process. He suggested that Longyear at Fisher Hill has complied with every zoning bylaw and there are certified documents to support that. In fact, he noted that the only clear certified documents before the Board show Longyear to be in total compliance with the zoning bylaw. The architectural certifications confirm that Longyear is below the FAR. He implored the Board to treat Longyear like every other building in Brookline. He noted that there are architectural certifications with the

integrity of the architectural seal and that is the standard upon which every building in Brookline is judged.

Mr. Allen then addressed Mr. Fishman's analysis. He opined that Mr. Fishman's analysis is incorrect. He asked the board to look at Building A on Exhibit 3. Mr. Fishman's analysis, he stated, not only improperly added in egress at the parking level but also added 3,955 square feet for finished basements. He called the Board's attention to the certified as-built plans for Building A, Units 101, 102, and 103. He stated that all three of those show basement levels as unfinished basements. He noted that the 1996 bylaw did not count unfinished basements towards FAR. Mr. Allen directed the Board to Exhibit 3, excerpts from the Master Deed highlighted as follows: "each unit includes a garage and unfinished areas on the basement level and one elevator." "Unfinished areas on the basement level." On the next page, Mr. Allen stated this would explain the difference between the assessor's records and the FAR; that the deeds reference the gross floor area without reference to what is FAR. However, he went on to note that the documents state "The area of each unit in Building A includes the basement and garage, as well as the first and second floor." He opined that unfinished basement do not count towards FAR.

Mr. Allen directed the Board to page 6 of Exhibit 3 and noted that it states, "No unit owner shall make any addition, alteration, or improvement without the permission of the trustees," and he stated that none have received such permission. Furthermore, he went on to note that no building permits had ever been pulled for the conversion of basement space in Building A, Units 101, 102, 103 to habitable space. He opined that the certified record before the Board shows that the three units in Building A were sold with unfinished basements, and yet someone says that should count, even though the bylaw says it shouldn't; even though the documents say there isn't such space; even though there is no building permit to convert it, it has been asserted that it should be included.

Mr. Allen stated that with respect to Building E, Mr. Fishman's analysis says that it is 30,781 square feet, period. In actuality, he noted it's 2,000 feet less. Mr. Allen introduced Hans Strauch, a Project architect who explained what areas have been excluded from the FAR in Building E to reach the 28,000 square feet. Mr. Allen stated that you don't simply take the box, because there are areas that can be legally excluded

under the 1996 bylaw. Mr. Allen noted that the certification of 28,000 square feet submitted to the Board does in fact include the new additions. He stressed that the additions weren't excluded, they were included.

Hans Strauch of HDS Architecture, 100 Talcott Avenue in Watertown discussed the FAR calculations for Building E. He stated that the interior staircases were included as part of the FAR calculation, as is required, and that was carried all the way up the building. In addition, he noted that the elevator at each level was counted as well. He stated that the deductions of space were primarily mechanical areas, shafts, as well as fireplaces on every level. He noted that the basement level included the fitness center and no deductions were made for that area. Areas that are not included are the boiler, mechanical, and storage areas. The additions were added to the FAR. He pointed out that there were two Building E schemes. The latest one shows 28,084 and a difference between the two of 14 square feet.

Mr. Silbert noted the difference is actually 16 square feet.

Hans Strauch continued describing the highest level, which is never used for habitation whatsoever, it is a mechanical attic.

Chairman Gordon asked if any space was decommissioned in Building E. Mr. Allen responded by stating there is no decommissioned space. Mr. Allen stated that the basement that was made into a fitness center was accounted for. Mr. Allen went on to note that spaces that were excluded were never occupied for human habitation, and it hasn't been decommissioned, but isn't included because the bylaw says it doesn't have to be included. He opined that Building E is a perfect example of the difference between fact and the fiction. He argued that you just can't take the box and pretend that there aren't exclusions. He noted the same could be said for Building C and D. He stated that for buildings, C and D and B, the parking is excluded, as is the egress for the parking and that is the case for every building in Brookline. He pointed out that several architects have certified the square footage. He believes the Developer built the Project as they promised to build it, it just took longer and the buildings aren't over the FAR. Rather, he argued they're 300-some-odd square feet under the FAR. In conclusion, he stated that the certifications of the architects are clear.

The next speaker, Don Weitzman of 123 Buckminster Road spoke in support of the Grossman's petition. Mr. Weitzman is a Town Meeting Member from Precinct 12, a former selectman, member of the Board of the Fisher Hill Association and a member of the Board of the Brookline Neighborhood Alliance.

Within the last several months, what drew his attention to this was the analysis that was done by Mr. Duffy's department. He believes that this analysis made it an issue of fact. He stated that he is not surprised that any architectural firm which is hired and paid for by the Developer would come in with certain assumptions. He believes it's something to be taken seriously. He stated that the other reason he was speaking was on behalf of trust of the neighborhoods of the Town and its political institutions and management of this Town by its Town hall and its Agents. He believes there's a real responsibility to establish trust in our institutions, and for the Board to come out with a decision that is not only right but has the appearance of being fair and of having gone the distance to make sure that it's fair. He doesn't understand why the Board would want to avoid having a third-party impartial reevaluation of this FAR issue.

Robert Franklin, 145 LaGrange Street spoke in support of Mr. Fishman's position. The issues concern him tremendously because he stated he is somebody that lives next to a house that is 150 percent of the allowable FAR. He suggested, an impartial analysis to get an answer.

There being no further requests to speak, the Board accepted Mr. DiCara's written waiver of the statutory time limits and read the letter into the record, a copy of the letter is incorporated herein by reference as Exhibit 4. The Board then continued the hearing to February 1, 2007 at 7:15 p.m.

February 1, 2007 (Second Night of Hearing)

At 7:15 P.M. the Public Hearing for the Zoning Board of Appeals was called to order by Chairman Diane Gordon. Zoning Board of Appeals members present were Chairman Diane Gordon, Bailey Silbert and Enid Starr.

Chairman Gordon stated that at the first night of hearing Attorney DiCara had presented to the Board a report from LeMessurier Consultants dated January 18, 2007, that improperly relied on the current Zoning By-Law rather the 1996 by-law in effect

when the special permit for the Project was issued. Chairman Gordon stated that the Board would allow Attorney DiCara to resubmit the consultants report using the 1996 By-Law. Chairman Gordon then stated that they will allow some people to speak in favor or in opposition that have not yet spoken.

Board Member Enid Starr stated that she would not repeat her disclosure, pursuant to M.G.L., c. 268A, s. 19, regarding Attorney Allen, since that is already on the record. Ms. Starr, however, did note that she had an additional disclosure, pursuant to M.G.L., c. 268A, s. 23(b)(3) concerning her relationship with Hans Strauch, an architect who has given a written opinion on this case. Ms. Starr stated that she and Mr. Strauch are both Trustees of Lesley University. Ms. Starr noted that neither she nor Mr. Strauch have a financial interest in Lesley University or in each others businesses. Ms. Starr stated that she contacted the Ethics Commission and they suggested that she make this disclosure and file a letter of disclosure with the Board of Selectmen which she did. Ms. Starr also noted that she has several close personal friends in the audience who are in support of the Grossman's application, however, this will not affect her ability to be impartial in this matter.

Chairman Diane Gordon stated that the Board is in receipt of some exhibits that she would like to enter into the record. Chairman Gordon read into the record, a letter from Andrew MacDonald, Principal, J. W. Higgins Realty to Attorney Lawrence DiCara, dated February 1, 2007 a copy of which was marked as Exhibit No. 5 and is incorporated herein by reference.

Chairman Gordon also stated that the Board has plans that Town Clerk Patrick Ward will identify and be marked as exhibits as well. These plans are the plans that the Grossman's expert, LeMessurier Consultants used in their analysis of the FAR. The Town Clerk read the following plans into the record which were marked as a group, as Exhibit No. 6 and are incorporated herein by reference:

1. A Building – Plan A101 – Floor Plans basement, First Floor, Second Floor, and Roof Plan – Steffian Bradley Associates, Inc.
2. B Building – A100 – Basement/Parking Plan – Steffian Bradley Associates, Inc.

3. B Building – A101 – First Floor Plan/Entry Canopy – Steffian Bradley Associates, Inc.
4. B Building – A102 – Second Floor Plan – Steffian Bradley Associates, Inc.
5. B Building – A103 – Third Floor Plan – Steffian Bradley Associates, Inc.
6. B Building – A104 – Fourth Floor Plan – Steffian Bradley Associates, Inc.
7. C Building – A100.1 – Basement/Parking Garage Plan – Steffian Bradley Associates, Inc.
8. C Building – A100.2 – Basement/Parking Garage Plan – Steffian Bradley Associates, Inc.
9. C Building – A101 – First Floor Plan – Steffian Bradley Associates, Inc.
10. C Building – A102 – Second Floor Plan – Steffian Bradley Associates, Inc.
11. C Building – A103 – Third Floor Plan – Steffian Bradley Associates, Inc.
12. C Building – A104 – Fourth Floor Plan – Steffian Bradley Associates, Inc.
13. C Building – A105 – Fifth Floor Plan – Steffian Bradley Associates, Inc.
14. D Building – A1 – Garage Floor Plan – HDS Architecture
15. D Building – A1.1 – First Floor Plan (Units 101 & 102) – HDS Architecture
16. D Building – A1.2 – Second Floor Plan (Units 201 & 202) – HDS Architecture
17. D Building – A1.3 – Third Floor Plan (Unit 301) – HDS Architecture
18. E Building – A1.0 – Basement Floor Plan – HDS Architecture
19. E Building – A1.1 – First Floor Plan – HDS Architecture
20. E Building – A1.2 – Second Floor Plan – HDS Architecture
21. E Building – A1.3 – Third Floor Plan – HDS Architecture
22. E Building – A1.4 – Mechanical Attic Plan – HDS Architecture

Mr. DiCara submitted the revised LeMessurier Consultant's report dated January 29, 2007 which was entered into the record as Exhibit 7 and is incorporated herein by reference.

Attorney Allen stated that the plans relating to Buildings A and B in Exhibit 6 are not the official plans according to the Town of Brookline. He stated that the official plans for the Town of Brookline are "as built" plans within the Building Department and the plans marked by the Board are not those plans. Attorney Allen stated further, that the plans for Building C, cited by the Town Clerk, are not the plans drawn by the architect of record. He noted that the plans read by the Town Clerk contain the name Steffian Bradley, however, the Town's records will show that the Architectural Team is the architect of record for Building C. Attorney Allen also stated that when the engineering report is presented by the Petitioner, that his clients would like to have the opportunity to respond to it immediately after its presentation. Chairman Gordon indicated that they would have that opportunity.

Attorney DiCara, representing the Grossmans, stated that the plans in question were the plans given to his office by the Town and are the plans upon which the measurements and calculations by LeMessurier were made. Attorney DiCara stated that the calculations show a greater than 15,000 square foot discrepancy which is the foundation for the Grossmans request for a third-party review. Attorney DiCara further stated that Mr. Gil Fishman will present these calculations to the Board.

Attorney Allen stated that he was under the impression that the Mr. Cheever, the engineer from LeMessurier Consultants would explain his findings.

Chairman Gordon asked Attorney DiCara if there was someone present from LeMessurier. Attorney DiCara stated that there was no one present from LeMessurier. He stated that the person who was to attend was unable to do so.

Chairman Gordon stated that won't allow Mr. Fishman to tell the Board what LeMessurier's report is saying. She stated that if Mr. Fishman wants to testify to something else, then that is certainly fine but not to the LeMessurier report. Chairman Gordon stated that Attorney DiCara can tell us what it says but she cannot entertain somebody else presenting another expert's methodology.

Attorney DiCara stated that the LeMessurier report concludes that Building A is 16,578 square feet; Building B is 48,996; Building C is 71,483; Building D is 21,285; and Building E is 31,702. Attorney DiCara stated that the total is 190,228 square feet, which is 15,645 square feet greater than allowed by the special permit issued by this Board.

Chairman Gordon stated that the January 18, 2007 LeMessurier report, which was not accepted by the Board, because it incorrectly used the current zoning by-law, contains the same calculations as their revised report dated January 29th. She asked Attorney DiCara if that statement was correct. Attorney DiCara stated that the calculations are similar.

Chairman Gordon stated that there is no explanation in the report of the methodology used by LeMessurier to make the calculations. She noted that the old report is 190,189 and the new report is 190,228. She stated that it looks as if the only discrepancy is a small addition that was allowed and was subject to a separate prior Board of Appeals case. Chairman Gordon stated that the reports are apparently identical regardless of the zoning by-law relied upon. She asked Attorney DiCara if that conclusion was accurate. Attorney DiCara stated that is what the consultants report indicates.

Chairman Gordon noted that there is no explanation provided in the LeMessurier report other than they adopted the submissions of Steffian Bradley for Buildings A through E and HDS Architecture, but it fails to indicate how they did their measuring. She noted that it tells the Board that they agree with the Developers' two architects as to what should be excluded from gross floor area, but there is no explanation as to the discrepancy between the two positions.

Attorney DiCara stated that the plans they were provided were from the Town and they used CAD/CAM, using the appropriate 1996 by-law and that these are the measurements they came up with.

Chairman Gordon asked Attorney DiCara if he was saying that the plans they relied upon were not the plans of record. Attorney DiCara stated they were the plans provided to them by the Town. He stated they assumed they were the plans of record.

Attorney DiCara stated that LeMessurier took the plans, the by-law in effect and prepared this report before the Board.

Chairman Gordon asked Attorney DiCara if the person who prepared this report was a structural engineer or architect. Attorney DiCara stated that he was a structural engineer.

Chairman Gordon asked Attorney DiCara if he wished to speak to the standing issue. Attorney DiCara said that he would.

Attorney DiCara stated that the letter from Andrew MacDonald a principal at J. W. Higgins suggests, from the point of view of a realtor who deals with properties in this price range, that the Grossmans are aggrieved. He stated that they are suffering a legitimate injury and are certainly abutters within 300 feet. Attorney DiCara, citing several cases, stated that they certainly have standing in this case. He noted that the Grossman's have several additional photographs taken during the past week proving that these are real and legitimate concerns arising out of the overbuilding of the Project, specifically out of the development of Building D. He noted that these are specifically the types of injuries that the courts have found confer standing.

Chairman Gordon asked the Board members if they had any questions for Mr. DiCara. There were none.

Ellen Grossman, a resident of 33 Leicester Street, Brookline, Massachusetts, stated that she and her husband have resided at this address for the past thirty-six and one-half years. Ms. Grossman noted that Mr. Fishman had only taken two photographs that were presented to the Board at its last meeting. She noted that those photographs seemed to create some confusion as to where he was standing when the photographs were taken. Ms. Grossman stated that her husband had taken a number of photographs recently to give to the Board. Ms. Grossman then individually described the photographs to the Board. Ms. Grossman stated that when this was first thought of as a Project, more than 200 neighbors were supportive of this Project because the alternative was a 12-story college dormitory. She noted that it is heartbreaking that this issue of measurements cannot be resolved.

The two panels of photographs were entered into the record as Exhibit No.8 and Exhibit No.9 and are incorporated herein by reference.

Ms. Starr suggested that the photographs that were entered into the record at the previous meeting of the Helman property and other properties are not relevant and should

not be included as a part of the record. Chairman Gordon stated those photographs speak to the standing issue and whether there are other people, other than the Grossman's who have been affected by Building D. Ms. Starr stated that she believed all the Board can look at is the Grossman's standing.

Attorney Allen noted for the record that Mr. Helman, appealed the grant of the design approval for Building D. Attorney Allen noted that Mr. Helman settled the appeal and waived all claims against the Town including any standing claims.

Chairman Gordon asked the Board if they had any questions for Ms. Grossman. There were none.

Chairman Gordon asked Attorney DiCara if he had anything further to state. Attorney DiCara stated that he didn't, but that there were several neighbors present in the audience who wished to speak.

Attorney Allen requested to speak to LeMessurier's report that was just presented by Attorney DiCara. Chairman Gordon stated that she wanted to hear from the public first and that Attorney Allen would have every opportunity to respond to the report later.

Pamela Lodish, a resident of 195 Fisher Avenue, Brookline, Massachusetts, stated that she had received the plans that LeMessurier relied upon from two different sources within the Town of Brookline. She stated that one source was Town Counsel's Office, because the case was in litigation, and the other was from Planning and Community Development where some CAD drawings were retrieved from the Department of Public Works. She stated that these plans were presented to her as the accurate plans for the development.

Gil Fishman stated that it was his understanding that the only substantive change between the 1996 Zoning By-Law and the present Zoning By-Law was that atriums now have to be counted. He argued that that gross floor area is the sum of all the floors but doesn't include space for parking. He opined that it does include all horizontal areas such as stairwells and elevator shafts. Mr. Fishman stated that he would not speak to LeMessurier's methodology, but that their report states that their analysis was based upon the Town's methodology for calculating gross floor area based on the zoning by-law and the long standing procedures followed by the Building Department since the adoption of the current zoning-by-law adopted in 1962. He noted that phrase comes directly from

Robert Duffy's analysis in 2005. Mr. Fishman stated that Mr. Duffy included the horizontal area in each floor and egresses.

Mr. Fishman stated that it is unfortunate that he is unable to speak to LeMessurier's figures because they are not present. He stated that all the Project architects are not present as well. He questioned the fairness of that decision. Mr. Fishman also stated that he stands before the Board this evening as a representative of every neighborhood in the Town of Brookline. He stated that all neighborhoods are subject to intense development pressures. He stated that this Board is the last stand for trust on this particular issue. He argued that there is clear and undisputed evidence that there is significant overbuilding on this site. He noted that they have been arguing for an independent analysis since 2004. He asked the Board, if they are not sure on the issue, to turn it over to someone who is independent to do the analysis. He urged the Board, on behalf of all the neighborhoods, to do it right.

Bruce Johnson, a resident of 80 Seaver Street, Brookline, Massachusetts, stated that he directly abuts the Longyear property and is four houses down from the Grossman's. Mr. Johnson stated that he had received no notice of this meeting this evening. Chairman Gordon asked Mr. Johnson if he received notice of the original hearing. Mr. Johnson stated that he had. Chairman Gordon stated that there is no notice issue, since this is a continuation of that hearing.

Mr. Johnson stated he believes the Board is holding each party to a different standard by not being able to discuss the LeMessurier report. He also stated the neighbors are not asking to hold up the construction. He stated that they are just asking for an independent analysis of the FAR.

Chairman Gordon asked if there was anyone else present who wished to speak in favor or in opposition to the appeal. There were none.

Attorney Allen stated that he would like to enter into the record the curriculum vitae of Peter J. Cheever of LeMessurier Consultants, the signatory of the report presented to the Board this evening. Attorney Allen stated that it clearly establishes that Mr. Cheever is a structural engineer and has no experience or certification in architecture and has never certified the size of a building. Chairman Gordon stated that she doesn't believe the Board can determine that from the curriculum vitae.

Attorney Allen stated that Mr. Cheever is not a member of any professional organization having to do with architecture. Chairman Gordon stated that a civil engineer could do this work. Attorney Allen noted that Mr. Cheever is not a civil engineer but a structural engineer. Chairman Gordon pointed out to Attorney Allen that he has a professional affiliation as a member of the American Society of Civil Engineers. The Chairman accepted the resume of Mr. Cheever as Exhibit No. 8.

Attorney Allen stated that the LeMessurier report tells the whole story. Attorney Allen stated that the LeMessurier report indicates it is based on the Town's methodology for conducting gross floor area based on the zoning by-law and the long standing procedures followed by the Building Department since the adoption of the current by-law in 1962. Attorney Allen stated that nothing could be further from the truth. He stated that if you do follow the by-law and the Town's practices, the LeMessurier report actually comes up with a gross floor area, for at least Buildings A, B and C, that is less than the Developer's certification.

Attorney Allen asked the Board to bring their attention to Building A. Attorney Allen stated that the LeMessurier report included the garage basement level in Building A of 4,499 square feet, because they claim it is usable. Attorney Allen noted that their basis for claiming it is usable is that it is included in the Assessors records. Attorney Allen stated that the Building Department never uses the Assessors records for determining FAR, because the Assessors, on a regular basis, include uninhabitable space in their records. He noted that the Assessors records exactly match the deeds that have been presented to the Board. Attorney Allen noted that the deeds include non-built out space. Attorney Allen stated that if you deduct out that 4,499 square feet that LeMessurier improperly included, the Board will find that it is 12,079 square feet; approximately 100 square feet less than the architect's certification.

Chairman Gordon asked Attorney Allen if he was stating that there is no habitable space in the basement of Building A. Attorney Allen responded by stating that there was none when it was built, there have been no building permits issued and the Trustees have not issued any permission to change that space.

Attorney Allen asked the Board to bring their attention to Building B. He stated that the Building Department has always taken the position that the by-law does not

include egress and stairwells in the garage level. He noted that every multi-family building, built in Brookline within the last 15-20 years, is built to that standard. Attorney Allen stated that the by-law is clear on that point. He stated that if you back out that area in Building B, the 2,220 square feet in the basement that they included, they are once again under the amount the Developers' architects have certified.

Attorney Allen stated that the same thing occurs for Building C. He stated that when you back out the 19,068 they describe in the basement, it still leaves a difference of about 2,000 square feet from the architect's certification. Attorney Allen then directed the Board's attention to the Building C certification. He noted that this will underscore that the LeMessurier analysis is blatantly wrong. Attorney Allen noted the first floor plan for Building C.

Ms. Starr asked Attorney Allen to go over the figures for Building B once again. Attorney Allen stated that if you subtract the basement area from the LeMessurier report it would leave 46,776 square feet, which is a little less than what the architect certified.

Attorney Allen stated that the first floor plan in Building C has 837 square feet of mechanical space according to the architect. He noted that all of this was done in consultation with the Building Department. Attorney Allen then noted that the LeMessurier report for the same area has only deducted 227 square feet for that same mechanical area. He stated that LeMessurier missed 400 square feet of mechanical space.

Attorney Allen then directed the Board's attention to the second floor of Building C. Attorney Allen stated that the architect certified 803 square feet for mechanical space on the second floor. He then noted that LeMessurier calculates only 171 square feet for mechanical space, they missed about 700 square feet.

Attorney Allen then directed the Board's attention to the third floor of Building C. Attorney Allen noted that the architect certified the mechanical space at 756 square feet. Attorney Allen stated that LeMessurier came up with only 170 square feet; a difference of approximately 600 square feet.

Attorney Allen then directed the Board's attention to the fourth floor of Building C. Attorney Allen stated that the architect has certified 713 square feet, but LeMessurier only came up with 142 square feet, yet the plans show the actual deductions per item.

Attorney Allen then directed the Board's attention to the fifth floor of Building C. Attorney Allen stated that the architect has 711 square feet while LeMessurier has only 180 square feet. Attorney Allen stated that under the figures in the LeMessurier report, their FAR is much less. He noted that according to the LeMessurier report they could build another small building.

Attorney Allen then directed the Board's attention to the first floor of Building D, LeMessurier has 119.81 square feet while the Building Department plans ascribe 180 square feet to this area.

Attorney Allen then directed the Board's attention to the second floor of Building D. He stated that LeMessurier claims 92.59 while the Building Department plans show 160 square feet.

Attorney Allen then directed the Board's attention to the third floor of Building D. He stated that LeMessurier claims 64.66 of square feet for this area while the Building Department plans show 153 square feet.

Attorney Allen stated that the same thing applies throughout for every building including Building E. He argued that LeMessurier did not add the areas in the certified plans correctly and that they did not follow the by-law. Attorney Allen noted that the by-law is very clear. It says to exclude "any such floor area intended and designed for accessing heating and ventilating equipment" and it has always been applied this way.

Attorney Allen stated that the Developers were very careful with these certifications and that each one of these certifications was verified with the Building Department and that this was their normal practice.

Attorney Allen stated if the Board takes these procedures and the by-law and applies it to the LeMessurier report there is over 2000 square feet remaining to build. He stated there is no need for an independent analysis, because every analysis presented to the Board shows that the Developer is within the FAR including the LeMessurier report.

Attorney Allen stated that the evidence before the Board is clear and undisputed that Longyear is well within the FAR and the facts before the Board require a finding dismissing this complaint. He noted that the Commissioner held the Developer's feet to the fire and required of the Developer more than has been required of any Developer in

town. Attorney Allen ended, by stating because of all this we are well within the by-law.

Ms. Starr asked Attorney Allen what is the total figure of the discrepancies he claims. Attorney Allen asked for a moment to calculate the figures.

Chairman Gordon asked Assistant Director for Planning, Polly S. Selkoe, Senior Building Inspector Frank Hitchcock and Town Counsel Jennifer Dopazo if they had anything to add. They did not have anything to add.

Paula Friedman, a resident of 170 Hyslop Road, Brookline, Massachusetts, Co-President of the Fisher Hill Association and a Precinct 14 Town Meeting Member, stated that because there is a dispute of facts there should be an independent assessment to prove what is correct.

Gil Fishman, stated that he wanted to respond to some of Attorney Allen's comments. Mr. Fishman stated that the reason for the discrepancies were because LeMessurier was more careful and more accurate, not because they were wrong. Mr. Fishman also noted that former Town Counsel David Turner had DPW do an analysis of Building C as well as former Director of Planning and Community Development Robert Duffy and they both determined that egress and stairwells should be counted. Mr. Fishman argued if the Building Department has been doing it wrong all these years and favoring the Developers, it should stop.

Attorney DiCara stated that he reviewed the Assessor's record for Building A on the Town's Website and there are two finished basements that the Town taxes as occupied space.

Virginia LaPlante, a resident of 58 Welland Road, Brookline, Massachusetts and a Precinct 6 Town Meeting Member, stated that this has been an ongoing problem and hopes there is an independent investigation so that people feel safer from intrusion by Developers.

Chairman Gordon stated that it was helpful to see the Ms. Grossman's photographs but indicated that she would like to take a site visit from the Grossman property. She also stated that she would like to have the attorneys for the Developer and the Grossmans there. She stated further, that all the Board would like to see the different

places from where the photographs were taken. Chairman Gordon noted that there is a serious issue of standing and the Board should see the site.

Chairman Gordon stated, in reference to the independent study, that the request is not falling on deaf ears, however, she believes the Board does not have authority or a budget to order a study to be performed other than by a Town agent. She noted that if this were an original application for relief the Board could order a study or impose a condition as is done for counterbalancing amenities. However, she noted that this matter is a G.L.c.40A, section 8 appeal from a determination of the Commissioner. The Board does not have the right to order such a study under that section. She further noted that the Board has the additional problem, if we could identify a Town agent to perform a study, of having residents of Longyear who don't want to let someone in to measure and they have every right to deny such access. She stated that this is not a public safety issue so access to the inside of these privately owned properties would be an issue.

Chairman Gordon stated that she had discussed the matter of obtaining a Town agent to perform a study with Town Counsel and that she reported that the Town Engineer probably could not do anything for the next two weeks.

Town Counsel Jennifer Dopazo stated that she had spoken to the Town Engineer who could perform the study within two weeks. She noted, however, that the Town Engineer would have to rely on someone telling him which areas under the zoning by-laws should be counted and which areas excluded.

Chairman Gordon noted that the study performed by Robert Duffy was done as a volunteer and was a preliminary draft that he did not want anyone to rely on. She noted that she would like to hear from the parties on the matter of a Town study.

Attorney Allen, in responding to Ms. Starr's earlier question concerning the total discrepancies in square footage, stated that without getting into the discrepancies in the basement of Building E and the Atrium, the total discrepancy for mechanical and garage access and Building A is approximately 13,000 square feet. Attorney Allen stated that he does not believe there is much disagreement as to the figures and the measurements. He noted that the crux of the issue is what they excluded and what they didn't exclude in calculating the FAR.

Chairman Gordon asked Attorney DiCara if he wanted the Town Engineer perform a study of the FAR. Attorney DiCara declined the offer and stated that they would prefer an independent study. Attorney Allen stated, based upon Attorney DiCara's response, that a study by the Town Engineer is not a worthwhile exercise.

The Board closed the hearing and set February 6, 2007 at 4:00 p.m. for the site visit. The Board continued the matter for deliberations to March 1, 2007 at 7:30 P.M.

March 1, 2007

Chairman Gordon announced that the hearing was closed on February 1, 2007 and that the Board would deliberate this evening. She stated that the Board, which is comprised of Enid Starr, Bailey Silbert and Diane Gordon, took a site visit of the Grossmans' residence at 33 Leicester Street. The Board was very courteously shown throughout the Grossmans' house, upstairs and down, front and rear.

The Board then considered the two pending motions filed by the Developer; one of which was noted could be dispositive of the case. The first motion the Board considered was the Developer's Motion to Limit the Grossman's petition to 8,590 square feet in excess of the allowable square footage rather than their more recent analysis which alleged that the Project was 15,000 +/- square feet in excess.

The Chairman's opinion was that the Grossman's application contained an estimate of the surplus square footage, and that a part of the Appellant's case is that, in fact, they don't know what the exact surplus is. The Chairman believes this motion should be denied.

Enid Starr commented that the gist of the application is more square feet than is permitted, so she doesn't think it makes a difference. She believes the issue is whether the Developer complied with the special permit as to the number of square feet in the Project. She stated she would also be inclined to deny the motion. Mr. Silbert had no comment.

The Board denied Longyear's Motion to limit the appeal to the 8,590 of excess square footage which was alleged in the Grossman's application.

The Chairman stated that the second motion to dismiss the case for lack of standing is considerably more complex and must be resolved before the Board can

address the merits of the challenge to the FAR of the Project, Building D in particular. Whereupon the Chairman asked for Town Counsel's opinion on this issue.

Jennifer Dopazo, Town Counsel addressed the Board. She requested to discuss a preliminary matter prior to the standing issue. She informed the Board that on Wednesday, February 28th, she received an e-mail from Gill Fishman. It was sent to Mike Shepard, Town Counsel, and Attorney DiCara, and copied to Commissioner Nickerson, Planning Director, Jeff Levine, Assistant Planning Director Polly Selkoe, Chief Building Inspector, Walter White, Selectmen Allen and DeWitt, and Richard Kelliher, Town Administrator.

Mr. Fishman requested that Town Counsel submit this e-mail to the Board in connection with this case. Town Counsel noted that the e-mail related to an issue that was raised prior to the close of the hearing on February 1st, as to which documents and plans were used to calculate the FAR by both parties. She informed the Board that within the last week, Michael Shepard, the Town's Zoning Administrator provided certain plans to Mr. Fishman at his request. In addition, the Developer provided some plans that their architects used in calculating the FAR.

Town Counsel opined that this would be considered newly discovered evidence, and she requested that the Board accept this e-mail communication along with the plans. Town Counsel noted that she provided Attorney Allen with a copy of the e-mail. She also requested Mr. Shepard to bring all of the plans with him this evening and recommended they be entered into the record to clear up this issue of which plans were used by the parties to calculate the FAR.

The Board then reviewed the e-mail and the plans.

Upon motion, the Board voted unanimously to open the hearing for the limited purpose of accepting into the record the e-mail from Mr. Fishman and the plans submitted by Mr. Shepard. The Chairman read into the record the e-mail message dated February 28th, 2007 to Jennifer Dopazo, Michael Shepard and Larry DiCara from Gill Fishman and it was marked as Exhibit 10A and is incorporated herein by reference.

Plans for Buildings A, B and C were submitted by Michael Shepard and entered into the record as Exhibit 10B as follows:

- Building A - two sheets, both dated 2/12/99, basement and first floor plans. The second dated the same date, 2/12/99, second floor and roof
- Building B - six sheets, the first dated January 25, 1999, basement/parking plan. The second dated January 26, 1999, first floor plan and entry canopy. The third is dated January 22, 1999, the second floor plan. The fourth is dated January 27, 1999, third floor. The fifth, January 27, 1999, the fourth floor. The last one, January 27, 1999, the roof plan and the fourth floor.
- Building C all dated 2/24/03 (9 sheets total) as follows: enlarged first Floor Plan No. 1. ; enlarged Floor Plan No. 2.; enlarged second Floor Plan No. 1; enlarged second Floor Plan No. 2; enlarged third Floor Plan No. 1; enlarged third floor Plan No. 2.; enlarged fourth Floor Plan No. 1; enlarged fourth Floor Plan No. 2.; and enlarged fifth floor plan.

Mr. Shepard explained to the Board that the Developer had used their own plans to determine their own gross square footage. Mr. Fishman requested copies of those plans. The Developer provided the plans to the Town and they were then provided to Mr. Fishman.

The Chairman asked Mr. Allen if he had any comments relative to Exhibits 10A and 10B. Mr. Allen had no comments. The Board voted unanimously to close the hearing.

The Board then called upon Town Counsel to discuss her legal memorandum to the Board dated February 26, 2007 addressing the standing issue. Town Counsel stated that G.L.c.40A is a very specific statutory scheme with precise procedures for appealing decisions by a Building Commissioner and taking an appeal to court from a Board's decision. She noted that the matter before the Board is a Section 8 appeal from the determination of the Commissioner that the Project complies with the special permit, specifically the FAR and his refusal to rescind the building permit and stop the work. She informed the Board that under Section 8, as well as under Section 17, which provides the avenue of appeal to superior court or land court from the Board's decision, the party taking the appeal must have standing. They must be persons aggrieved. In either case, whether the party comes before the Board or appeals to Court they must have standing.

The harm that is required to be suffered by the applicant is a particularized injury; it must affect a private legal interest. In this case, she noted that some of the evidence submitted by the Grossmans are Ellen Grossman's testimony about the location of her house and the location of the Project in relationship; photographs of the Project which were taken from or near the Grossmans' property; the LeMessurier Consultants Group report dated January 29, 2007; as well as the opinion of Andrew MacDonald, a real estate appraiser, dated February 1, 2007, which addressed the impact of Building D on the value of the Grossmans' house. In addition, the Board conducted a site visit and viewed the areas, both within and around the Grossmans' property. Finally, she noted, there was an e-mail communication and some additional plans submitted with respect to the FAR calculations.

Town Counsel stated that in her review of the case law and evidence with respect to standing this was a close call. She noted that the Board must find standing to proceed to the merits of this case because it is a jurisdictional issue. She noted that by statute, G.L.c.40A, s.15, the Board's vote on this dispositive motion must be unanimous.

The Board thanked Town Counsel and proceeded to review some of the evidence submitted to the Board.

The Chairman noted that she had read some of the case law and she believed it was a close call with respect to standing. However, she felt strongly that the case should be decided on the merits. She noted that it was clear that standing was a jurisdictional prerequisite. She noted that the Grossmans as abutters to abutters within 300 feet of the site, are afforded a presumption of standing. However, she understood that when standing was challenged the parties must produce evidence of aggrievement. In fact, the harm must be a real and not speculative one. She discussed a Court decision involving a project in Harvard Square where the Court found that aesthetic considerations were not sufficient to confer standing. She noted that general civil interest and public concern, again, doesn't create grounds for standing. The Chairman went on to state that the Grossmans' concern about the density has some viability. At the site visit she noted that the Project was fairly visible from at least half of their house. She believes you could argue that if, in fact, Building D was not built to the special permit specifications, then the density argument would have some weight with respect to standing. Although she

felt it was not an easy decision she believes there is enough to deny the motion and to go on to the merits of the case.

Enid Starr stated that she has concerns about standing. She noted that in her review of the cases loss of a view, except in certain isolated incidents does not confer a private legal right. However, loss of light, shading, would confer private legal rights. At the site visit she noted that Building D was to the north, so it would not, as a matter of fact affect light or shading, because the sun does not come from that direction. All the cases seem to hold that the affect on value of the property does confer a private legal right. She noted that the Grossmans did present an opinion letter from a real estate expert indicating that for whatever the reason, the value of the Grossmans' home is diminished by the new construction. She believes that is enough to find standing, however, she opined that without that letter from the real estate person, she would not have found standing. She went on to state that in this case, there is a reference to the diminution of the value of the property, and nothing was submitted by the Developer to refute that opinion. She believes evidence of diminished property value which is unrefuted is enough to confer standing.

Mr. Silbert stated that the real estate appraiser's opinion was not refuted and all the cases that the Board was were given to study indicates to him that there was sufficient testimony and evidence so the Board could find standing. He believes that to be the case here.

Upon motion the Board unanimously voted to deny the Developer's Motion to Dismiss for Lack of Standing.

The Board then moved on to deliberations with respect to the merits of the case and the Grossman's position that the Project exceeded the allowable FAR.

The Chairman noted that there was a challenge as to whether Building D at 120 Seaver complies with the FAR requirements and the zoning relief that was granted by this Board in 1996 and thereafter, pursuant to the zoning bylaw and building code that were in effect at that time. She noted that the allowable FAR is 0.5 and the square footage for the Project is limited to 174,583 square feet plus the 180 square feet that was granted to a resident of Building C for a patio which was outside of the scope of this case where the individual owners sought their own special permit relief. The Developer has alleged that

they will have 174,253 plus this 180 when the Project is completed. The Board was provided with certifications from the registered architects of record for Buildings A through E, and in each case, the square footage was calculated using a similar if not identical method with deductions made for exempt areas of each of the buildings.

The Chairman went on to note that the Grossmans submitted a report from LeMessurier Consultants that differs from the architects' certifications with respect to the square footage of the Project. There was also a demand to conduct an independent analysis. While that may have been an option earlier when relief was sought the Chairman did not think it was within the Board's purview in this case to order such an analysis and even if they could she felt there was no authority to demand that homeowners allow people into their homes to do any measuring. In her opinion, the stamp of the architect is always what should be relied upon, and in this case that is what she will rely upon.

Enid Starr agreed with the Chairman. She was also persuaded by the fact that in Longyear's presentation, there is a series of several architects' certifications, and those are the architects that actually built the buildings. They were not, she stated, "hired guns," or hired experts. In her opinion, when there is a discrepancy between a series of architects who actually were the architects of record and another firm that was hired and has no firsthand knowledge of the buildings, the credibility should go to the architects of record.

Mr. Silbert stated that he is an architect, and in his opinion there certainly is integrity to an architect's stamp. He stated that architects work extremely hard and go to great efforts for their clients and don't take lightly to affixing their seal to a set of drawings. He believes Ms. Starr's comment is an astute observation; that the architects are the architects of record for the Project and not just architects without any prior knowledge of the design. Mr. Silbert supports the findings of the architects of record.

Chairman Gordon asked Mr. Silbert, in his review of the Architectural Team and of the HDS records, did he find that the exceptions or areas excluded from the FAR calculations that were taken by each of them was appropriate.

Mr. Silbert believed the exceptions were appropriate. He noted that he requested some help from Mr. Fishman with regard to the statement that appears in Line Item 6. For example, Line Item 6, to egress corridors, including vestibules involved located on

levels, "designed for the parking of motor vehicles... may be omitted from the gross floor area." This was repeated in certifications of the other two architects. Mr. Silbert noted that the response that was something to the effect that interpretations of the code varied. He believes in this case, where the basement level is used extensively for the purpose of parking cars, then the question becomes, do you count what might be a means of egress to that parking area. Mr. Silbert opined that the nine exemptions taken by the architects of record are reasonable, especially in light of the pictorial representation of the exempted spaces.

Enid Starr stated that it is up to the Board to interpret the zoning bylaw, and she has looked at the by-law. She believes that the interpretation by the various architects for the Developer is an appropriate interpretation of the actual bylaw, with respect to what gets counted and what should be excluded from the FAR calculations.

Upon motion by Ms. Starr the Board voted unanimously to deny the Grossman's appeal and request for enforcement.

Unanimous Decision of
The Board of Appeals:


Diane Gordon, Chair

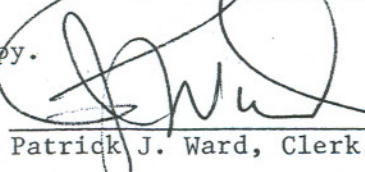

Bailey Silbert, Member


Enid Starr, Member

Filing Date: April 12, 2007

A True Copy.

ATTEST:


Patrick J. Ward, Clerk

RECEIVED
TOWN OF BURLINGAME
TOWN CLERK
2007 APR 12 A 11:32